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Imagine the following scenario: Janet, the employee benefits plan administrator for ABC Corporation, meets with Steve, an attorney, for legal assistance in deciding whether to deny benefits to Tom, an ABC Corporation employee who is appealing a prior denial of benefits. After conferring with Steve, Janet decides to deny Tom benefits. Tom subsequently brings an Employee Retirement Income Security Act (ERISA) claim against the plan to recover his benefits, and he demands access to the contents of Janet and Steve’s prior communications.

Is Tom entitled to access? Plan administrators and attorneys have traditionally assumed that the attorney-client privilege protects such communications as confidential under the belief that plan administrators, and not plan beneficiaries, are the attorneys’ clients. Depending on the jurisdiction, however, Tom may be entitled to access to Steve and Janet’s communications due to the “fiduciary exception” to the attorney-client privilege. This article will explore the ramifications of the fiduciary exception to the attorney-client privilege in the fiduciary and plan beneficiary context.

The fiduciary exception provides that when an attorney gives advice to a client who is acting as a fiduciary for third-party beneficiaries, the attorney owes the beneficiaries a duty of full disclosure.¹ In the employee benefits context, the fiduciary exception addresses the notion that “at least as to advice regarding plan administration, a trustee is not ‘the real client’ and thus never enjoyed the privilege in the first place.”² According to this rationale, beneficiaries should, as the clients, have access to the substance of legal communications relating to plan administration, especially since the legal advice is often sought for the beneficiaries’ benefit and at their expense.³ Ironically, the fiduciary exception is not really an exception at all, but instead defines the scope of the attorney-client relationship to include beneficiaries, making them deserving of the attorney-client privilege.⁴ Therefore, according to the fiduciary exception, attorneys owe beneficiaries a duty of full disclosure and cannot rely on the attorney-client privilege to withhold from beneficiaries the substance of advice given to fiduciaries.

In the ERISA context, the fiduciary exception generally only applies to communications with an attorney related to plan administration, including benefits decisions, but not to communications following a final benefits decision or “addressing a challenge to the plan

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William E. Mason and Briton S. Collins represent clients in a range of legal matters including representing employers on Employee Retirement Income Security Act (ERISA) and benefit plans, litigation and privacy and open records requirements. This article was written with the assistance of Mary Katherine Rawls, who will graduate in 2014 from the University of Tennessee College of Law.

Kennerly, Montgomery & Finley, P.C.
550 Main Street W.
Knoxville, Tennessee 37902
865.312.8814 Phone
865.524.1773 Fax
wemason@kmfpc.com
bcollins@kmfpc.com
www.kmfpc.com
administrator in his or her personal capacity.” For instance, in Geissal v. Moore Medical Corp., it was held that an employee whose COBRA coverage was terminated after the plan administrator conferred with an attorney was entitled to “know what the legal opinion was, in oral and written forms.” Courts have rationalized applying the fiduciary exception to pre-decisional legal advice, despite the prospect of post-decisional litigation, on the grounds that “denying benefits to a beneficiary is as much a part of the administration of a plan as conferring benefits to a beneficiary.” In these instances, all plan beneficiaries, including the ultimately disappointed beneficiary, are entitled to know what the legal opinion was. The fiduciary exception may continue to apply where a claimant files a timely administrative appeal of a denial of benefits, since the benefits decision is not considered “final” during the pendency of the administrative appeal. However, where a claim presents a “real and substantial possibility of litigation,” the fiduciary exception typically does not apply. For example, in one case, communications following a claimant’s counsel’s argumentative correspondence demanding payment of the claim in question and threatening the pursuit of claims in court were ruled protected by the attorney-client privilege. It is unclear whether communications occurring after a final benefits decision remain subject to the fiduciary exception for all beneficiaries other than the disappointed beneficiary; however, language from existing cases suggests that once a final benefits decision has been made, or there is a real and substantial possibility of litigation, the fiduciary may obtain legal advice without fear of any beneficiaries gaining access.

Whom the attorney’s advice benefits is also important in determining the fiduciary exception’s applicability. Because an employer often wears two hats in plan administration — one involving the fiduciary duty owed to its employees and the other involving the employer’s own interests in areas such as plan design, amendment and termination — whether the attorney-client privilege applies to a communication requires an examination of its content and context to determine whether it was for the benefit of the beneficiaries or employer. For example, when a communication is for the benefit of an employer in connection with its consideration of plan adoption, courts generally find that the communication encompasses a non-fiduciary matter and is inaccessible by beneficiaries.

What is the best practice for attorneys and plan administrators in light of the fiduciary exception?

Because jurisdictions are increasingly recognizing the fiduciary exception, it is wise for attorneys and plan administrators in jurisdictions that have not yet addressed the exception to nonetheless manage their affairs as if it applies. An important consideration for attorneys thinking strategically will be properly structuring their relationship and interaction with benefits staff with regards to counseling that occurs before an ERISA claim is filed. The first blush reaction — to avoid creating anything but the most bland record of counseling and advice sessions — is probably an over-reaction and fails to account for the deference courts pay to administrators in reviewing benefits decisions under the “arbitrary and capricious” standard. A plan administrator’s decision is considered arbitrary and capricious only when it “is without reason, unsupported by substantial evidence or erroneous as a matter of law.” Therefore, rather than minimizing the advice or the record, the best practice is for the administrator and attorney to instead, consistent with ERISA principles, continue to have the robust discussions warranted by benefits claims, including the pros and cons of the facts, strengths and weaknesses of applicable law, ambiguities in plan documents, etc. The advice and its bases should be recorded and preserved in all mediums to ensure that there is a clear, contemporaneous record of the administrator’s non-arbitrary, full and diligent consideration of the claim. In the event the claim is denied and suit is brought, discovery of the record, including the advice of plan counsel, may help justify and support the reviewing court’s decision to dismiss the claim.

2 United States v. Mett, 1778 F.3d 1058, 1063 (9th Cir. 1999).
5 Id. at *11.
8 Geissal, 192 F.R.D. at 625.
10 Id. at 913.
13 Solis v. Food Employers Labor Relations Ass’n, 644 F.3d 221, 228 (4th Cir. 2011).